SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-686

JILL S. LOESER,

Petitioner,

vs.

JULIUS LOESER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, FIRST DISTRICT

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To the Justices of the Supreme Court of the United States:

Petitioner, Jill S. Loeser, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Indiana, First District, affirming the decision of the Superior Court of Vigo County, Indiana, refusing to modify a decree of divorce granting custody of the minor child of the parties to Respondent husband, and on its own motion decreasing Petitioner's rights of visitation and contact with the child.

This cause is a proceeding for divorce in the Courts of Indiana. Respondent husband was granted custody of the minor child of the parties in an ex parte hearing after Petitioner had been improperly defaulted, service having purportedly been made upon her in Illinois by certified mail, the receipt for certified mail having been signed by someone other than Petitioner. There is no evidence as to facts upon which jurisdiction could properly be predicated. No hearing was had on the issue of custody, Petitioner's Petition to Modify the Decree of Divorce regarding the issue of child custody was denied peremptorily, and Petitioner was arbitrarily foreclosed from presenting evidence regarding the change in circumstances of the parties. The Court, on its own motion, reduced petitioner's rights to visitation and contact with the child, even though Respondent has requested no such relief. The judgment was affirmed by the Court of Appeals of Indiana. The Indiana Supreme Court denied a Petition to Transfer.

OPINIONS BELOW

The opinion of the Court of Appeals of Indiana is as yet unreported, and is reproduced as Appendix "A" to this Petition. The order of the Superior Court of Vigo County, Indiana, is unreported, and is reproduced as Appendix "B" to this Petition.

JURISDICTION

The judgment of the Court of Appeals of Indiana was entered on May 29, 1974. A petition for rehearing was filed on June 14, 1974 and denied on July 2, 1974. A petition to transfer to the Supreme Court of Indiana was filed on July 22, 1974 and denied on October 3, 1974. The jurisdiction of this Court rests on 28 U.S.C. §1257(2) and (3).

QUESTIONS PRESENTED

1. Whether a state statute allowing service in a child custody proceeding upon an out of state defendant by certified mail, but not requiring delivery to addressee only, complies with due process of law.

2. Whether a state court has jurisdiction to determine custody of a minor child of the parties in a divorce proceeding where the child has been taken from the jurisdiction of that Court by the consent of the parties prior to the filing of the divorce proceeding.

3. Whether the Court has violated the right of the mother of a child and the rights of the child by entering an order granting custody of that child to the father without hearing any evidence on the issue of the fitness of the parties to custody or on the issue of the best interests of the child.

4. Whether a Court may arbitrarily refuse to hear evidence on the issue of change of circumstances of the parties.

5. Whether the Court has violated the rights of the mother of a child and the rights of the child by refusing to allow the mother to introduce evidence on the changed circumstances of the parties subsequent to the entry of the original custody order.

6. Whether the Court has violated the rights of the mother of a child and the rights of the child by reducing the visitations rights and contacts of the mother with the child on its own motion and without any request for such relief having been made.

STATEMENT OF THE CASE

The parties to this cause, Jill and Julius Loeser, were married on August 25, 1965. A child, Jeffrey Michael, was born to them on January 22, 1968. The parties who were living in Terre Haute, Indiana, commenced having marital difficulties, and on March 26, 1971, the father, with the consent of the mother, took the child to the mother's parents in Highland Park, Illinois. Since that date, the mother has maintained her residence in Highland Park, Illinois.

On April 19, 1971, Julius commenced a suit for divorce in the Superior Court of Vigo County, Indiana. Service of summons upon Jill was allegedly had by certified mail at the address of her parents in Highland Park, Illinois. The receipt for certified mail was not signed by Jill.

On June 4, 1971, Jill filed a suit for separate maintenance in the Circuit Court of Lake County, Illinois. On June 10, 1971, Julius obtained a restraining order without notice to Jill from the Vigo County Superior Court restraining Jill from prosecuting her suit in Illinois, and on June 14, 1971, a temporary injunction to the same effect was issued, again without notice.

On June 21, 1971, the Vigo County Superior Court defaulted Jill, and granted Julius a divorce and custody of the minor child. No evidence was heard at the divorce hearing regarding the issue of custody of the minor child, the Court specifically stating, "We're trying a divorce case here, not a—. . . not a hearing on custody in the future."

Armed with his ex-parte decree, Julius filed a petition for writ of habeas corpus in the Circuit Court of Lake County, Illinois. On July 8, 1971, the Circuit Court of Lake County dismissed Jill's suit for separate maintenance, and entered an order requiring Jill to turn over to Julius the custody of the minor child. No evidentiary hearing was had, the Court's decision being predicated entirely upon the *ex parte* decree which had been entered by the Indiana Court. An appeal was taken to the Illinois Supreme Court which affirmed the decision of the Circuit Court. This Court denied Jill's Petition for Writ of Certiorari. During the pendency of the appeal to the Illinois Supreme Court, the minor child was in the custody of Jill's parents, pursuant to order of Court. After the conclusion of the proceedings there, Jill delivered the minor child to Julius in June, 1972, pursuant to the order of that Court.

On December 11, 1972, for the first time, Jill entered her appearance in the Vigo County, Indiana, Court, for the purpose of seeking modification of the decree, and on December 22 she filed a Petition to Modify the Decree of Divorce requesting that she be given custody of the minor child and requesting child support. What purported to be a hearing on that Petition was held on April 18, 1973. Jill, however, was precluded by the Court from even attempting to prove the allegations of her petition.

At that aborted hearing, the trial court refused to allow Jill to present any evidence concerning events which had

occurred prior to the entry of the decree of divorce. Most significantly, the Court refused to allow Jill to question Julius as to whether it was he who had removed the minor child from the State of Indiana, and chose the place to which the child was taken.

Even further, the trial court refused to allow the plaintiff to introduce any evidence regarding the period of time between the entry of the decree of divorce on June 21, 1971, and June, 1972, when Julius was given actual physical custody of the child, despite the fact that the custody of the child was being held by Jill's parents pursuant to the lawful order of the Supreme Court of Illinois, which had jurisdiction over the cause, stating:

> "At the time this matter was in litigation outside this Court—until this court order was complied with, I think there is nothing in the past that is admissible as far as custody is concerned—change in circumstances. I'm sure that's Indiana law."

When challenged on this ruling by Jill's counsel, the Court rejoined:

> "Are you saying to me that you cannot comply with the terms of the judgment and then come in to change the judgment and use the very methods or the very tactics or the very fact that you created—use that to change the terms after you haven't complied. That violates all the logic of equity and even the sense of finality and enforcibility of judgments.
> "Mr. Bauer: But you had an order out of the Illinois court that Mrs. Loeser abided by.
> "The Court: If I remember right, she lost that one, too."
>
> * * *
>
> "The Court: Well, I'll tell you where the Court stands on this question. As I said before, I'm not going to listen to any evidence—and I don't think it's appli-

> cable at all—any evidence concerning the custody of this child so long as this Court's order was not being followed. As I said, I don't think you can use your own act to bolster your own position when you are not in compliance with the order of the Court. So I'll hear no evidence on this thing other than a change in circumstances that occarred since the time that the plaintiff has had custody of the child."

At the conclusion of the hearing, the Court refused to change the custody of the child. Jill was granted visitation rights one weekend per month, and thirty days during each summer, and one-half of the Christmas vacation. Jill was directed to place not more than one telephone call per week to the child. Jill was further ordered to post a performance bond in the sum of Ten Thousand Dollars ($10,000.00).

The Indiana Court of Appeals affirmed this decision. It held that Jill had been served properly, and had waived any right to present evidence on the original matter of custody by virtue of having been found in default in the original suit.

The Indiana Court of Appeals refused to pass upon whether the trial court had properly foreclosed her from presenting evidence regarding changed circumstances in the period between June, 1971, and June, 1972, on the gound that this issue had not been saved for review, ruling that Jill's post-trial motion did not "set out the question, the objection, the statement of counsel as to what the evidence would be if the witness was permitted to answer, and the court's ruling thereon."

The Court of Appeals held that the evidence on the record was sufficient to sustain the trial court's refusal to modify the divorce decree. The Indiana Supreme Court denied Jill's Petition to Transfer the cause to that Court.

REASONS FOR GRANTING THE WRIT

I.

THE INDIANA COURT HAD NO JURISDICTION OVER THE PETITIONER AND THE MINOR CHILD OF THE PARTIES

This case presents the horrifying picture of a mother caught in a maze of technicalities which completely deprived her of ever having a hearing on the merits of the issue closest to the heart of every parent—the custody of a minor child of tender years. Never, in any Court, has she been allowed to present her side of the question on this issue. At every turn, she was foreclosed from doing so, based upon an original decree of divorce which it is clear was outside the power of the Court to enter in the first place.

Jurisdiction over Jill S. Loeser in the original proceeding was based upon Indiana Trial Rule 4.4, which provides, in pertinent part:

> "(A) Acts serving as a basis for jurisdiction. Any person . . ., a resident of this state who has left the state, . . . submits to the jurisdiction of the courts of this state as to any action arising from the following acts committed by him or his agent:
>
> • • •
>
> "(7) living in the marital relationship within the state notwithstanding subsequent departure from the state, as to all obligations for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in the state."

Service was allegedly made on Jill pursuant to Indiana Trial Rule 4.1, which provides, in pertinent part:

> "(A) In general. Service may be made upon an individual, or an individual acting in a representative capacity, by
>
> "(1) sending a copy of the summons and complaint by registered or certified mail or other public means by which a written acknowledgement of receipt may be requested and obtained to his residence, place of business or employment with return receipt requested and returned showing receipt of the letter;"

The return receipt in this cause showed receipt by Jill's mother. There is no evidence in the record that this address was the usual place of abode of either Jill or her mother. There is no evidence in the record that Jill did in fact receive the summons and complaint.

In effect, the postal carrier who delivered the letter was substituted as a person properly authorized to serve summonses. No return of service was required by him, or anyone else which would give to the Court any adequate indication that it was reasonably likely that Jill would receive the summons and complaint. There is no evidence in the record that she did in fact receive such summons or complaint.

The issue here was before this Court in *May* v. *Anderson*, 345 U.S. 528, 73 S.Ct. 840 (1953). There, the Court recognized the doctrine that while a State may have the right to determine the status of the parties in a divorce proceeding, in order to determine the rights to child custody and support or alimony, that State Court must first have jurisdiction of the person of both parties. See also *Estin* v. *Estin*, 334 U.S. 541, 68 S.Ct. 1213 and *Kreiger* v. *Kreiger*, 334 U.S. 555, 68 S.Ct. 1221. In so holding, this Court noted:

> "* * * the weight of authority is in favor of confining the jurisdiction of the court in an action for divorce, where the defendant is a nonresident and does not appear, and process upon the defendant is by substituted service only, to a determination of the *status* of the parties. * * * This rule of law extends to children who are not within the jurisdiction of the court when the decree is rendered, where the defendant is not a resident of the state of the seat of the court, and has neither been personally served with process nor appeared to the action." Id. at 534 (fn. 8)

That this is the well recognized and accepted law is without doubt. As was said by the Court of Appeals for the District of Columbia Circuit in *Wagner* v. *Wagner*, 293 F.2d 533, 536 (1961):

> "Since the former husband was served outside the District of Columbia, an award of support would be 'void except as to property within the jurisdiction of the court which has been specifically proceeded against' in the divorce or maintenance action."

Here, neither the mother nor the child were present in the State of Indiana at the time the divorce proceedings were brought. Indeed, the child had been removed from the State by the *father,* the party bringing the suit. He, by his own actions, deprived the Courts of Indiana of jurisdiction over the minor child. Having done so, he cannot now assert that that court had jurisdiction to determine custody rights to that child, residing in Illinois. The mother was never served within the State, nor did she appear in that divorce proceeding. The order of the Superior Court insofar as it pertained to the custody of the child was absolutely void.

Furthermore, the purported service upon the mother violated due process as well. It is constitutionally required

that service outside of a state give "reasonable assurance that the notice will be actual." *International Shoe Co.* v. *Washington,* 326 U.S. 310, 320, 66 S.Ct. 154, 160; *Hess* v. *Pawlowski,* 274 U.S. 372, 48 S.Ct. 362; *McDonald* v. *MacBee,* 243 U.S. 92, 37 S.Ct. 343. The form of service required varies with the subject matter of the litigation and the nature of the parties. Certainly where we are dealing with the most personal of rights the strictest form of service is required, to assure with certainty that the defendant have actual notice of the proceeding. Especially is this so where the issues deal with not only the rights of the parties to the litigation, but also with the rights of a minor child of tender years.

The guidelines concerning service of process were set down by this Court in *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314-15, 70 S.Ct. 652, 657 (1950):

> "Against this interest of the State [in bringing issues to a final settlement] we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that 'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis* v. *Ordean,* 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L. Ed. 1363. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.
>
> • • •
>
> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [citing cases] The notice

> must be of such nature as reasonably to convey the required information, *Grannis* v. *Ordean, supra,* and it must afford a reasonable time for those interested to make their appearance . . . . 'The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' *American Land Co.* v. *Zeiss,* 219 U.S. 47, 67, 31 S.Ct. 200, 207, 55 L. Ed. 82, and see *Blinn* v. *Nelson,* 222 U.S. 1, 7, 32 S.Ct. 1, 2, 56 L. Ed. 65, Ann. Cas. 1913B, 555."

Here it is obvious that the statute involved has no requirement that constitutionally sufficient notice be sent. Nor was constitutionally sufficient service accomplished here. The mailing used was not limited to delivery only to the wife, nor did she in fact receipt for the mailing. There is nothing in the record to even indicate that the mailing was sent to the wife's actual residence.

Clearly the original order of child custody was void. This Court should grant certiorari in this case to declare once and for all the type of service which is required upon out of state persons in connection with child custody matters. Should this decision of the Indiana Courts, and others like it, stand, untold harm will continue to occur in connection with the most personal of rights—rights of parents to their children. It cannot be emphasized enough that the rights of the children involved are perhaps paramount in such cases. Their rights must be protected properly. Allowing Courts which do not have jurisdiction over such children to determine such rights visits a great injustice upon such children, and fails to grant them the protection to which they are constitutionally entitled. On this ground alone certiorari ought to be granted.

II.

PETITIONER AND HER CHILD WERE DEPRIVED OF A HEARING ON THE ISSUE OF CHILD CUSTODY

Never has a full and fair hearing been held on the issue of the custody of this child, either in the Indiana or Illinois courts, or anywhere. The original divorce hearing contains no evidence whatsoever regarding the best interests of the child, or the fitness of either parent to have custody of that child. Feeling itself precluded from hearing the matter on the basis of the order entered in that cause, the Illinois Courts refused to hear any evidence upon that issue. When Petitioner applied to the Indiana courts in this proceeding, she was foreclosed from presenting evidence on this question. The Superior Court allowed her to present evidence only dating from the time that the child's custody had been turned over to the father, and nothing relating to the entire period prior thereto. She was not given an opportunity to present any evidence of her fitness to have the child, or his attitude and actions while he was in her custody, after the decree of divorce had been entered. Furthermore, the trial Court, on its own motion, and without the hearing of evidence thereon, limited plaintiff's communication with her young child. Whereas she had been allowed by the father to telephone the child every evening, the Court limited her in this respect by allowing her only one telephone call per week. The reasons for the trial court's rulings in this regard are clear. He was angered by the fact that the wife had commenced certain litigation in Illinois regarding these same issues and had retained custody of the child for a period of time. He based his rulings upon a punitive attitude which is clearly not sanctioned by any approach to the law, particularly as it

relates to the rights of children and parents. He found the plaintiff, in effect, guilty of contempt for failing to obey the order of his Court (which the Court had no jurisdiction to make), even though her custody of the child was pursuant to the lawful orders of the Illinois courts during the pendency of proceedings in those courts. She complied at all times with all orders of the Illinois Courts, which had jurisdiction over all parties. Such a punitive attitude must be condemned.

Thus, plaintiff was penalized by the Indiana trial court because she had resorted to the Illinois Courts for relief in this matter. At all times, she complied with the orders of the Illinois courts. She was punished for resorting to the Courts for a proper adjudication of the matters at issue. As a result of this ruling, she was deprived of the opportunity to testify to anything that had occurred while the child was lawfully in her custody pursuant to the orders of the Illinois Court, a period of fourteen months, which had a significant bearing upon the life and lifestyle of a child of such tender years. Such a punitive attitude toward litigation has never been countenanced. It must not be the basis of any final determination in a situation like the present one.

This Court condemned any such approach to child custody in *Stanley* v. *Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L. Ed. 2d 551 (1972). There, the Court struck down a presumption that an unwed father was unfit to have the custody of his children. The Court stated the interests regarding child custody thusly:

> "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing in-

terest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' *Kovacs* v. *Cooper*, 336 U.S. 77, 95, 69 S.Ct. 448, 458, 93 L. Ed. 513 (1949) (Frankfurter, J., concurring).

"The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' . . . 'basic civil rights of man,' . . . and '[r]ights far more precious . . . than property rights,' . . . . 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' . . . The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, . . . the Equal Protection Clause of the Fourteenth Amendment, . . . and the Ninth Amendment, ..." (citations omitted)

That case, of course, dealt with a dispute between a parent and the State. No less are the rights of each parent of a child because the dispute is between the two of them. Each has the same rights and liabilities, and each is entitled to a full and fair hearing before they may be deprived of those rights. This was made clear by this Court in the context of the right to chattels in *Fuentes* v. *Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L. Ed. 2d 556 (1973), where it was said: "It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods." Id. at 87, 92 S.Ct. at 1997-98. How much more important are the rights to the custody of a child.

The impropriety of these rulings was of course raised in the Indiana Court of Appeals. The rulings of that Court, however, are more inexplicable. That court recognized that the child's "welfare and best interest are the paramount and controlling considerations in all disputes over the custody of the child." *Gilchrist* v. *Gilchrist*, 225 Ind. 367, 372, 75 N.E. 2d 417 (1947). Yet, it then proceeded to ignore this principle, in ruling that the wife had not properly preserved her objections to the evidentiary rulings for review. A more technical ruling than was made by the Indiana Court of Appeals can hardly be imagined. It held that citing the substance of the objection in the wife's post-trial motion was insufficient to preserve the grounds on appeal, but that the specific question, ruling and offer to prove must be set out verbatim in that motion. Thus, this procedural technique was used to foreclose the wife, the mother, from a hearing on the merits of her claim. This is yet another denial of due process. Indeed, there is a serious question that this ruling was correct under Indiana law. *Daben Realty Co., Inc.* v. *Stewart*, 293 N.E. 2d 809 (Ind. App. 1972); and *Prudential Ins. Co.* v. *Winans*, 308 N.E. 2d 727 (Ind. App. 1974). Certainly, Petitioner could not have anticipated such a ruling. To deprive her of a hearing on the merits on an obviously improper ruling upon such a ground is outrageous. Indeed, such a ruling is much more egregious than that condemned in *Stanley*, where the Illinois law raised only a presumption, which the parent had an opportunity to rebut. In short, the Indiana Courts have raised one procedural stumbling block after another to deprive Petitioner here of any hearing on an issue of the utmost constitutional and human concern. Such an obvious miscarriage of justice cries out for correction. This Court presents the last opportunity for redress.

CONCLUSION

Jill Loeser has been subjected to a series of rulings which have so obviously deprived her of due process as to shock the conscience of any thinking person. That they have been made in the name of procedural requirements is doubly unconscionable. Not once has she been able to have a full determination of the most basic of rights—the rights of a mother to the custody and companionship of her child. The deprivation of such custody stems from one obviously void order entered by a court which not only had no jurisdiction or power to enter such order, but also held no hearing in connection with the relief which it granted. Not only have the rights of Jill Loeser been denied, but her minor child has been similarly denied the rights to a judicial determination of his best interests. The bill of rights is not for adults alone. *Application of Gault,* 387 U.S. 1, 13, 87 S.Ct. 1429, 1436 (1967). The child's rights have received no attention whatsoever. A State in which he did not live has taken him from his mother, without proper service, and without hearing, and without any opportunity to correct the situation. Are his rights to be so cavalierly ignored? Is he to be callously shunted aside as having no interest in these proceedings? Is he not to have his day in Court? Is his mother to be deprived of all of her rights?

The checkered history of this case is a judicial nightmare. Due Process has been ignored in the name of procedure, and the false sense of dignity of a judge. Such actions must not be allowed to occur in what purports to be a free society dedicated to justice for all.

Wherefore, petitioner prays that this Court's Writ of Certiorari issue and that the judgment below be reversed, and that Petitioner be given an opportunity for a fair hearing in a court of competent jurisdiction.

Respectfully submitted,

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APPENDIX "A"

Opinion of the Indiana Court of Appeals

LOWDERMILK, J.

Defendant-appellant, Jill S. Loeser, and plaintiff-appellee, Julius Loeser, will be hereinafter referred to as "Jill" and "Julius" and the minor child of the parties as "Jeffrey."

Jill and Julius were married August 28, 1965, and Jeffrey was born to this union on January 22, 1968. The marriage was not one of bliss and happiness and Jill and Julius had marital difficulties which resulted in Julius taking Jeffrey to Highland Park, Illinois, to Jill's parents on March 26, 1971. Jill has since that time resided with her parents at their Illinois residence and she kept custody of Jeffrey until ordered by an Illinois court to give Jeffrey to Julius, about the 22nd day of May, 1972.

On April 19, 1971, Julius filed suit for divorce in the Superior Court of Vigo County, and proof of service of summons and process on Jill was made by the clerk's return of service of summons by mail, together with return receipts. On June 4, 1971, Jill filed suit for separate maintenance and custody of Jeffrey in the Circuit Court of Lake County, Illinois. On June 10, 1971, Julius obtained a restraining order without notice from the Vigo Superior Court which prohibited Jill from further prosecution of her action in Illinois. A temporary injunction was issued on June 14, 1971.

Then, on June 21, 1971, the Vigo Court granted Julius a divorce after a hearing at which Jill defaulted. Jill did

not appear in the divorce action, as she said, because of the way she had been treated in Terre Haute and because her attorneys advised her that the courts of Illinois had jurisdiction of the action. She knew she was charged with the misconduct of adultery and did not want to face it at that time.

A Terre Haute attorney had been employed by attorney Arthur Morse of Chicago to consult with him in regard to the course of action Mr. Morse should take in respect to Jill. Neither said Terre Haute attorney nor Mr. Morse appeared of record on Jill's behalf; however, the Terre Haute attorney was in the court room as an observer and was called as a witness by Julius at the trial. He testified that attorney Morse had told him that he would not appear in the cause and no one should appear in Jill's behalf.

On June 28, 1971, Julius filed a petition for writ of habeas corpus in the Circuit Court of Lake County, Illinois, and on July 8th of that year in that cause the Lake Circuit Court dismissed Jill's separate maintenance suit and entered an order requiring Jill to deliver Jeffrey to Julius. That case was decided on the question of jurisdiction.

Jill took that case to the Illinois Supreme Court on the day the judgment was made against her and on July 14, 1971, the Illinois Supreme Court issued an order staying the writ of habeas corpus and ordered Jeffrey to be placed in the custody of Jill's parents, Leonard and Gladys Scheyer, and granted Julius visitation, one week each month in Chicago.

The Illinois Supreme Court, on May 22, 1972, affirmed the decision of the Lake Circuit Court and later set aside

its stay order and Jill delivered Jeffrey to Julius. She was allowed to have Jeffrey visit for one week each month in Illinois.

Jill filed a petition for writ of certiorari in the United States Supreme Court and the same was denied on November 13, 1972. Thereafter, Jill was allowed by Julius to visit Jeffrey every other weekend at Julius' residence in Terre Haute.

During this litigation and from March 26, 1971, until June of 1972, Jill had the physical custody of Jeffrey; after June, 1972, Julius had the physical custody and charge of Jeffrey.

Jill's appearance was entered by her Terre Haute attorney in Vigo County on December 11, 1972, and on December 22nd of that year she filed her petition to modify the decree, which was heard on April 18, 1973.

Appellant Jill's brief contains much of the evidence covering the facts of the divorce case. However, we shall consider that evidence as surplusage in the appeal before us inasmuch as Jill's motion to modify the decree as to custody is all that is before this court.

Jill's motion to correct errors was timely filed, consists of six specifications, together with a memorandum of reasons and is directed to the petition to modify the custody under the decree.

On August 3, 1972, the trial court overruled the motion to correct errors and Jill did, on August 20, 1973, file her praecipe for a full and complete transcript of the entire record of the cause, beginning with plaintiff's complaint for absolute divorce.

(Appendix "A")

Jill has consolidated for argument specifications of her motion to correct errors 1, 2, 3, and 6, and we shall treat them as one under Ind. Rules of Procedure, Appellate Rule 8.3(A)(7), which specifications raise the following issue; did the trial court commit error by refusing to hear evidence at the hearing on the petition to modify relating to matters which occurred prior to the granting of the divorce decree? Jill argues that the trial court did not have before it sufficient evidence at the trial of the divorce to properly make a determination as to the custody of Jeffrey. Jill contends that since the divorce was *ex parte*, she has had no opportunity to present evidence relating to matters prior to the granting of the divorce decree.

However, it is our opinion that Jill cannot be now heard to complain that she had no opportunity to present evidence at the trial of the divorce case. The record discloses that Jill was properly served and had notice of the trial and, in fact, had her Indiana attorney present at the trial as an observer. The Indiana attorney had specific instructions not to enter an appearance on Jill's behalf. Jill had the opportunity and right to be heard and present evidence at the trial and it was by her choice that she did not exercise such rights and cannot now be heard to complain.

In the case of *Dufour* v. *Dufour* (1971), ... Ind. ....., 273 N.E. 2d 102, 104, 105, our Supreme Court held:

> ". . . It is a well settled rule of law that the modification hearing cannot be used to retry the issues settled by the divorce decree. . . .
>
> • • •

(Appendix "A")

> Accordingly, testimony regarding the appellant's conduct prior to the original divorce decree was inadmissible in the modification hearing, and does not, therefore, support the trial court's decision."

This is further borne out by the case of *Huston* v. *Huston* (1971), ... Ind. ....., 267 N.E. 2d 170, wherein it was held that a change of custody must result from changes in conditions since the last court order which necessitates a change of custody, for the welfare of the children.

Thus, it is clear that the trial court properly excluded evidence of conduct of the parties prior to the last court order (the divorce decree).

Appellant Jill's specifications of error 4 and 5 have been consolidated by her in her brief and argued together. These specifications, briefly, are that the court erred in not permitting Jill to present evidence to show a change of conditions as to Jeffrey's welfare while in her custody and the custody of her parents while in Lake County, Illinois, from and after the rendition of the divorce in Vigo County, Indiana, in June of 1971, to June of 1972, at which time the custody of Jeffrey was returned to Julius at Terre Haute.

Jill contends she was punished for pursuing her Illinois action by exclusion of her evidence during the year Jeffrey was out of the jurisdiction of the court and after she had purged herself of any contempt of the Indiana court by delivering her son to Julius.

Julius first contends on this issue that Jill failed to make a proper offer to prove at trial. An examination of the record discloses that when Jill did attempt to introduce

evidence relating to the one year period in question, the trial court sustained an objection to any such evidence and informed the parties that no such evidence would be heard. Counsel for Jill made it clear to the court what the evidence was intended to prove, although he did not make it in the words of an offer to prove in the usual and accepted form of offer to prove as established by usage and custom in Indiana.

Without deciding whether the offer to prove was sufficient to save the question in the trial court, and assuming arguendo that the offer to prove was sufficient, we must first decide whether this issue has been properly saved for appeal.

Julius also urges that Jill has failed to comply with Ind. Rules of Procedure, Trial Rule 59, Motion to Correct Errors, (B), which reads as follows, to-wit:

> "(B) Form of motion. A motion to correct error shall state the issues upon which error is claimed, but the issues are not required to be stated under or in the language of the reasons allowed by these rules, by statute or by other law. The statement of claimed errors shall be specific rather than general, and shall be accompanied by a statement of the facts and grounds upon which the errors are based."

We are now confronted with the problem of whether Jill did or did not save her record on this issue in her motion to correct errors. A careful review of the motion to correct errors, together with the memorandum made a part thereof, discloses a complete failure to set out the question, the objection, the statement of counsel as to what the evidence

would be if the witness was permitted to answer, and the court's ruling thereon.

The case of *Daben Realty Co., Inc.* v. *Stewart* (1972), ... Ind. App. ....., 290 N.E. 2d 809, 812, in speaking on this proposition, states:

> "Nowhere in the motion nor in appellant's brief is the question or the plaintiff's objection set out, either in substance or verbatim.
>
> Trial Rule 59(B), IC 1971, 34-5-1-1, requires that '[t]he statement of claimed errors [in the motion to correct errors] shall be specific rather than general . . . .' This rule, we believe, preserves the pre-existing case law requirement that:
>
> > '" In order to preserve for review the refusal of the court to permit a witness to answer a question on direct examination, *the motion for new trial must show the question, the objection, and the offer to prove what evidence would have been given by the witness in answer to the question.*" . . .'
>
> Appellant's failure to comply with the rule results in nothing being presented to us for review. . . ." (Our emphasis.)

See, also, *State* v. *Haldik* (1973), ... Ind. App. ....., 302 N.E. 2d 544.

In the case of *Bennett* v. *State* (1973), ... Ind. App. ....., 304 N.E. 2d 827, this court, in passing on the requirement of saving a question for appeal by properly setting it out in the motion to correct errors, said:

> "While the motion to correct errors serves as the complaint on appeal, its primary purpose is to afford

the trial court the opportunity to rectify errors it has committed. *Bud Gates, Inc.* v. *Jackson* (1970), 147 Ind. App. 123, 258 N.E. 2d 691.

Without being informed by a specific statement of the facts and grounds on which the claimed error is based, the trial judge cannot rectify his errors, if any. Were it otherwise, an appellant could propel himself into this or the Supreme Court by general statements of claimed errors, detailed at leisure after his motion to correct errors is overruled. . . ."

This question is jurisdictional and although the question, objection, court's ruling, and an informal offer to prove have been set out in the brief the same is inadequate to preserve the question on appeal as a waiver has already taken place by the failure to follow the requirements of TR. 59 (B) in the motion to correct errors.

The third issue is a compilation of specifications of error numbered 1, 2, 3, 4, 5, and 6, and is whether the trial court in its ruling abused its discretion and the ruling was contrary to law in that it failed to change custody of the minor child to Jill.

Our Supreme Court held, in the case of *Gilchrist* v. *Gilchrist* (1947), 225 Ind. 367, 372, 75 N.E. 2d 417, as follows:

". . . The rights of parents, however, are not absolute. They must yield to the welfare of the child. Its welfare and best interest are paramount and controlling considerations in all disputes over the custody of the child. [Cases cited omitted.] The disposition of children is not controlled by hard and fast rules of law but by the exercise of the sound judicial discretion of the court

confronted with the problem. Review by an appellate court of such disposition is limited to the question of abuse of judicial discretion. [Cases cited omitted.]"

The evidence as to Jeffrey's conduct, behavior and well being and as to his best interests is conflicting. It is elementary that this court does not weigh the evidence. There is adequate evidence upon which the trial court could find as it did.

The case of *Brickley* v. *Brickley* (1965), 247 Ind. 201, 204, 210 N.E. 2d 850, relates as follows:

> "While we are not able to say the trial judge could not have found otherwise than he did upon the evidence introduced below, this Court as a court of review has heretofore held by a long line of decisions that we are in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, did not properly understand the significance of the evidence, or that he should have found its preponderance or the inferences therefrom to be different from what he did.
>
> On appeal it is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by appellant before there is a basis for reversal. . . ."

Judgment affirmed.

ROBERTSON, P.J. and LYBROOK, J. concur.

APPENDIX "B"

Order of the Superior Court of Vigo County

The Court, having heretofore heard the evidence in this cause relative to Defendant's petition to modify the decree entered by this Court on June 21, 1971, and now being sufficiently advised, denies said petition insofar as custody of the minor child of the parties is concerned. It is hereby Ordered that said decree be modified as to visitation rights as follows:

1. Defendant shall have the right to have the minor child of the parties, namely Jeffrey Loeser, now age five years, visit with her one weekend per month, from Friday evening until Sunday afternoon at 4:00 P.M. following.

2. Defendant shall have the right to have the child visit with her for thirty (30) consecutive days during the summer vacation, such visitation to be arranged at least one month prior to the visitation period. During the time said child is with Defendant, Plaintiff shall pay directly to Defendant the sum of One Hundred Dollars ($100.00) per week for the support of said child.

3. Defendant shall have the right to have the child visit with her for one-half (½) of the Christmas vacation each year, said visitation to be arranged and agreed upon thirty (30) days prior to the beginning of the vacation period.

4. Defendant is directed to limit telephone calls to said child to not more than one (1) call per week.

(Appendix "B")

5. This order effective upon Defendant posting with the Court a performance bond in the amount of Ten Thousand Dollars ($10,000.00) guaranteeing strict compliance with this Order, surety on said bond subject to the approval of the Court. Said bond shall be effective for a term of one (1) year and subject to renewal from year to year or to cancellation upon satisfactory compliance with the terms of this Order.

6. Otherwise, the decree heretofore entered shall remain in full force and effect.

So Ordered this 3rd day of May, 1973.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-686

JILL S. LOESER,

Petitioner,

vs.

JULIUS LOESER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, FIRST DISTRICT

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OPINIONS BELOW

The opinion of the Court of Appeals of Indiana is as yet unreported and is reproduced herein as Appendix "A". The order of the Superior Court of Vigo County, Indiana is unreported and is reproduced as Appendix "B". The opinion of the Supreme Court of Illinois in *People Ex. Rel. Loeser* v. *Loeser* is reported in 51 Ill.2d 567, 283 N.E.2d 884 and is reprinted in Appendix "C" herein.

JURISDICTION

Respondent respectfully submits that this Court is without jurisdiction to grant certiorari to the Court of Appeals of Indiana, First District. The jurisdiction of this Court is prescribed by Article 3, Sections 1 and 2, of the Constitution of

the United States and by Title 28 U.S.C.A., Sec. 1257(2)(3). No constitutional question is presented by the record below. In a companion case, *People Ex. Rel. Loeser* v. *Loeser*, 51 Ill.2d 567, 283 N.E.2d 884, for a writ of habeas corpus, involving the same parties and the same constitutional question, the Illinois Supreme Court held that the Indiana Long Arm Rules satisfied due process requirements. A petition for writ of certiorari was denied by this Court. 409 U.S. 1007, 93 S.Ct. 436 (1972).

Petitioner has not demonstrated that this Court has jurisdiction to entertain this petition.

QUESTIONS PRESENTED

The petition sets forth six questions to this Court:

> "1. Whether a state statute allowing service in a child custody proceeding upon an out of state defendant by certified mail, but not requiring delivery to addressee only, complies with due process of law."

This precise question was raised and resolved adversely to Petitioner in *People Ex. Rel. Loeser* v. *Loeser, supra,* and that judgment is res judicata in these proceedings. Too, the constitutionality of the Indiana Long Arm Statute was not made an issue either in the Superior Court of Vigo County, or on appeal to the Court of Appeals of Indiana, and is now presented to this Court for the first time in these proceedings.

> "2. Whether a state court has jurisdiction to determine custody of a minor child of the parties in a divorce proceeding where the child has been taken from the jurisdiction of that Court by the consent of the parties prior to the filing of the divorce proceeding."

This question belatedly challenges the jurisdiction of the Superior Court of Vigo County in the original divorce proceedings, and this constitutes a collateral attack upon the decree of divorce. Petitioner's sole remedy was a direct appeal to the

Indiana Court of Appeals, which was never perfected. "* * * Jill's motion to modify the decree is all that is before this Court * * *" (Judge Lowdermilk's opinion for the Indiana Court of Appeals).

> "3. Whether the Court has violated the rights of the mother of a child and the rights of the child by entering an order granting custody of that child to the father without hearing any evidence on the issue of fitness of the parties to custody or on the issue of the best interests of the child."

By this specification, Petitioner seeks to review the original divorce decree, which she did not timely do by way of a direct appeal after entry of the decree. Too, this question was not presented in the petition to modify to either the Superior Court of Vigo County, or to the Court of Appeals of Indiana. See Petitioner's motion to correct errors, reproduced as Appendix "D". The divorce court expressly found that Respondent was a suitable and proper person to have custody of Jeffrey, and that Petitioner was not a fit and proper person to have Jeffrey's custody. The order of the Superior Court of Vigo County in the initial divorce proceedings is reproduced as Appendix "E". This precise question was urged before the Illinois Supreme Court, which expressly held: "There is, nevertheless, sufficient testimony to support the Court's finding." Accordingly, this specification is res judicata and was not before the Court on Petitioner's petition to modify the original custody order.

> "4. Whether a Court may arbitrarily refuse to hear evidence on the issue of change of circumstances of the parties.
>
> 5. Whether the Court has violated the rights of the mother of a child and the rights of the child by refusing to allow the mother to introduce evidence on the changed circumstances of the parties subsequent to the entry of the original custody order."

These specifications raise questions of local law only. Petitioner does not and cannot contend that her constitutional rights were violated.

Judge Bitzegaio refused to permit Petitioner to testify as to Jeffrey's home life after entry of the divorce decree and while he was wrongfully in his mother's custody. No offer to prove was made by Petitioner to this or any other question to which objections were sustained. Under Indiana law, nothing was preserved for review by the Court of Appeals of Indiana. This Court is bound by the law of Indiana as to the admissibility of evidence and preservation of the errors to be relied upon on appeal. This Court, in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), said:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

This Court should not and cannot concern itself with the propriety or impropriety of rulings made on the admission or exclusion of evidence, or when state law is not complied with in order to preserve error.

> "6. Whether the Court has violated the rights of the mother of a child and the rights of the child by reducing the visitation rights and contacts of the mother with the child on its own motion and without any request for such relief having been made."

This specification requests this Court to determine the reasonableness of the visitation order entered on the Petitioner's petition to modify. This is clearly a question of local law.

STATEMENT OF THE CASE

Petitioner's statement of the case, as it relates to the many legal proceedings both in the Illinois and Indiana Courts, is substantially correct.

Petitioner has consistently asserted that the original divorce decree was rendered "exparte." Petitioner does not assert that

she was unaware of the pendency of the divorce action, nor that she had not received notice of the trial assignment. Petitioner's attorney, Arthur Morse, employed Frederick T. Bauer, of the Terre Haute Bar, to consult with him concerning this litigation. Bauer was served with all pleadings filed in the divorce case and was given notice of the trial assignment. He was instructed by Mr. Morse that no appearance should be entered. Bauer was present throughout the hearing on the complaint for divorce and was called as a witness by Respondent. "I am not appearing of record. I am merely an observer" (R. 164). Petitioner's motive in electing not to appear was, obviously, designed to frustrate the jurisdiction of the Indiana Court, the marital domicile of the parties, in an effort to seek a forum in which Respondent would be at a disadvantage in presenting live witnesses. Petitioner, before entry of the decree of divorce, brought an action in the Lake Circuit Court of Illinois for separate maintenance against Respondent. By this device, Petitioner sought to resolve the custody issue in Illinois.

Petitioner erroneously represents to this Court that no evidence was heard at the divorce hearing regarding the issue of custody. There was, in fact, substantial evidence of probative value introduced in the divorce proceedings to support the Court's finding that Petitioner was not a fit and proper person to have Jeffrey's custody (R. pp. 132 through 157).

Petitioner further erroneously represents to this Court that a "purported hearing" was had on her petition to modify the divorce decree, and that she was precluded by the Court "* * * from even attempting to prove the allegations in her petition" (App. F). A full scale hearing was conducted. Petitioner tendered Robert L. Powers (R. 169), a registered Psychologist, who testified fully concerning his treatment of Petitioner, her emotional state, mental condition and her qualifications as a mother. The Court permitted Petitioner, over objection, to introduce a letter from a Dr. Schulman, who, in effect, testified to hearsay matters in support of Petitioner's contention that she was emo-

tionally stable and competent. Petitioner offered the desposition of Ruby Dikowski, who was employed by Respondent as a domestic after Respondent finally got Jeffrey's custody. Petitioner's mother (R. 192) testified on her behalf and to Petitioner's care of Jeffrey during his visitations at her home and the facilities available to him. Petitioner then elected to tender Respondent as her witness (R. 245). Petitioner then testified in her own behalf (R. 211).

Petitioner characterizes the hearing on her petition as an "* * * aborted hearing," because the court refused to allow Petitioner to present evidence concerning events *which had occurred prior to the entry of the decree.* This is in accord with Indiana law.(See *Adams* v. *Purtlebaugh*, 230 Ind. 269, 102 N.E.2d 499 (1951)).

Petitioner is extremely critical of Judge Bitzegaio's rulings excluding evidence. The jurisdiction of this Court is set forth in Title 28 U.S.C.A., Sec. 1257 (2 and 3). The issue concerning the exclusion of evidence is not within the scope of either of these sections. The constitutionality of a statute of the State of Indiana is not here involved. Neither is a Federal question involved. Federal Courts are without authority to function as an Appellate arm of the State Courts. *Pilkinton* v. *Pilkinton*, 389 F.2d 32 (1968) (8 Cir.) Accordingly, the exclusion of evidence in the state court does not provide grounds to grant certiorari.

The Court of Appeals of Indiana properly held that a modification hearing cannot be used to retry the issues settled by the divorce decree.

REASONS FOR DENYING THE WRIT

I. The Indiana Court Had Jurisdiction Over the Petitioner and the Minor Child of the Parties

The Indiana Court had in personam jurisdiction over the Petitioner and the minor child of the parties. Petitioner, in her discussion under this topic, asserts the invalidity of the Indiana

Long Arm Rules. This question was raised by this Petitioner in *People Ex. Rel. Loeser* v. *Loeser*, 51 Ill.2d 567, 283 N.E.2d 884. The Illinois Supreme Court in that case, after citing the Indiana Long Arm Rules, expressly held:

> "The requisites of due process are satisfied if the manner of effecting service of summons gives reasonable assurance that notice will actually be given and the person against whom the action is brought is given reasonable time to appear and defend on the merits. (McGee v. International Life Insurance Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed. 2d 223; International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95.) Service as effected under the Indiana statute and rules meets this test, and due process does not require precise compliance with the allegedly more stringent requirements of the Illinois statute and the rules of this court.
>
> We find no basis for reversal and the judgment of the circuit court of Lake County is affirmed."

Petitioner filed a petition for a writ of certiorari to the Supreme Court of Illinois, 409 U.S. 1007, 93 S.Ct. 436, on this identical issue. The petition for writ of certiorari was denied.

This Court, in *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591, 68 S.Ct. 715 (1948) (pp. 715, 719), held:

> "* * * But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, res judicata is usually and more accurately referred to as estoppel by judgment, or collateral estoppel."

Neither in Petitioner's petition to modify the decree, nor in her motion to correct errors, nor in her brief in the Indiana Court of Appeals, did she assert the unconstitutionality of the Indiana Long Arm Rules. The Petitioner, for the first time in the proceedings to modify the decree, asserts the invalidity of the process in the original divorce decree. This Court, in the case of *Tacon* v. *Arizona*, 410 U.S. 351, 93 S.Ct. 998 (1973), said:

> "The petition for certiorari in this case presented questions as to constitutional limits on the States' authority to try in absentia a person who has voluntarily left the State and is unable, for financial reasons, to return to that State. *Upon reviewing the record, however, it appears that these broad questions were not raised by the petitioner below nor passed upon by the Arizona Supreme Court. We cannot decide issues raised for the first time here.* Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969)." (Emphasis added.)

This Court, in *Nelson* v. *County of Los Angeles*, 362 U.S. 1, 80 S.Ct. 527 (1960), said:

> "We do not pass upon petitioner's contention as to the Privileges and Immunities Clause of the 14th Amendment, since it was neither raised in nor considered by the California courts."

Again, this Court, in *Williams* v. *Kaiser*, 323 U.S. 471, 65 S.Ct. 363 (1945), held that it would not review the decision of a state court in the absence of an affirmative showing that the federal question was presented to the highest court of the state having jurisdiction, and that its decision of the federal question was necessary to its determination of the cause. To the same effect, see *Wilson* v. *Cook*, 327 U.S. 474, 66 S.Ct. 663, 666 (1946). This Court, in *Ellis* v. *Dixon*, 349 U.S. 458, 75 S.Ct. 850, 852 (1955), said:

> "The question of whether the regulations are unconstitutionality vague was not raised below, and hence is not opened here."

Petitioner asserts that never, in any court, has she been allowed to present her side of the question on the issue of custody. This is erroneous. She, by design and deliberation and upon advice of counsel and with full knowledge of the pendency of the divorce action, elected not to participate in the trial. She cannot now be heard to complain. She had the opportunity to present her side of the question on the custody

issue, but elected not to do so. In no event is a constitutional question presented which has not already been resolved.

Aside from the above, this Court and the Courts of Appeal have uniformly held that they will not exercise jurisdiction in domestic relations cases. In *Albanese* v. *Richter*, 161 F.2d 688, 689 (1947), the Court of Appeals, Third Circuit, said:

> "Mere diversity of citizenship and jurisdictional amount, in and of themselves, are not sufficient to give jurisdiction to federal courts. 28 U.S.C.A. Sec. 41(1), as interpreted by the courts, has been held consistently not to include suits primarily involving domestic relations. Fountain v. Ravenel, 1854, 17 How. 369, 58 U.S. 369, 15 L.Ed. 80; and see In re Burrus, 1890, 136 U.S. 586, 593, 10 S.Ct. 850, 34 L.Ed. 500, and Williams v. North Carolina, 1945, 325 U.S. 226, 233, 237, 65 S.Ct. 1092, 89 L.Ed. 1577, 157 A.L.R. 1366."

In *Hernstadt* v. *Hernstadt*, 373 F.2d 316 (1967), the Second Circuit held:

> "Since the very early dicta In re Burrus, 136 U.S. 586, 10 S.Ct. 850, 34 L.Ed. 500 (1890), it has been uniformly held that *federal courts do not adjudicate cases involving the custody of minors and, a fortiori, rights of visitation.* See 1A Moore's Federal Practice, Para. 0.201; Vestal & Foster, Implied Limitations on the Diversity Jurisdiction of Federal Courts, 41 Minn.L.Rev. 1, 31-36 (1956).
>
> However, where the constitutional claim is frivolous, as here, the suit should be dismissed as an impermissible attempt to embroil the federal courts *in matrimonial matters best left to the states.*" (Emphasis added.)

The latest care on this question is *Gargallo* v. *Gargallo*, 472 F.2d 1219 (1973). The Sixth Circuit there said:

> "This is essentially a child custody case. While the language of the diversity statute, 28 U.S.C. Sec. 1332, may be broad enough to encompass this action, this court is bound by the long standing exception to the statute that federal courts will not accept jurisdiction in domestic

> relations cases. Barber v. Barber, 62 U.S. (21 How.) 582, 584, 16 L.Ed. 226 (1858). In 1890 this rule was found to *encompass* child custody cases, In re Burris, 136 U.S. 586, 10 S.Ct. 850, 34 L.Ed. 500. *There the Court stated: 'The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States.'* 136 U.S. at 593-594, 10 S.Ct. at 853. Subsequent decisions have been in accord. Hernstadt v. Hernstadt, 373 F.2d 316 (2d Cir. 1967); Harris v. Turner, 329 F.2d 918, 923 (6th Cir. 1964); Carqueville v. Woodruff, 153 F.2d 1011 (6th Cir. 1946).
>
> Under the above rule, we hold the District Court was correct in its finding that federal courts lack jurisdiction over the subject matter." (Emphasis added.)

In Petitioner's prior petition for writ of certiorari, Petitioner, under "Reasons For Granting the Writ," said:

> "The Indiana 'Long Arm' statute offends due process because it does not require restricted mail delivery and was not entitled to full faith and credit by the American courts."

This is, in effect, the identical issue presented under Proposition I and which was determined adversely to Petitioner by the Illinois Supreme Court and by this Court, which denied Petitioner's writ.

Respondent has no quarrel with the many cases cited on the question of whether or not Long Arm Statutes conform with due process. Petitioner cites *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-315, 70 S.Ct. 652, Respondent is in accord with the following language of this Court in the cited case:

> "The fundamental requisite of due process of law is the opportunity to be heard."

Petitioner has never contended she was deprived of the opportunity to be heard. She has never asserted that her attorneys were not served with the pleadings nor advised of the trial as-

signment. All that is required to satisfy due process is "* * * reasonable assurance that the notice will be actual." *International Shoe Company* v. *Washington*, 326 U.S. 310, 66 S.Ct. 154, 160 (1945). It was!

Petitioner's entire argument on the validity of the Indiana Long Arm Statute is purely hypothetical, because the summons was served upon and acknowledged by her mother, with whom she was then living. Petitioner has never contended that she did not in fact know of the pendency of the action. Under these circumstances, due process was satisfied. Her argument on the question of due process lacks conviction, because Petitioner did in fact know, had an opportunity to defend and voluntarily declined.

Rather than this presenting a "* * * horrifying picture of a mother caught in a maze of technicalities * * *", it presents a simple case of a devious effort to frustrate the judicial processes of Indiana and an obvious attempt at forum shopping.

In the final analysis, since this question was not raised below, nor on appeal to the Indiana Court of Appeals, it cannot now be raised for the first time in these proceedings.

II. Petitioner and Her Child Were Not Deprived of a Hearing on the Issue of Child Custody

It is Respondent's contention that this Court is powerless to review the determination made by the Superior Court of Vigo County, and which was affirmed by the Indiana Court of Appeals. The jurisdiction of this Court originates in Article 3, Secs. 1 and 2 of the Constitution of the United States, which reads as follows:

> "Section 1. The judicial Power of the United States, shall be vested in one supreme Court * * *.
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States * * * between Citizens of dif-

> ferent States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. * * *. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

In pursuance of such authority, the Congress of the United States enacted Title 28, Sec. 1257, which reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

The jurisdiction of this Court to grant writs of certiorari is, by virtue of the constitutional provisions and the Act of Congress set forth above, confined to the review of the validity of a state statute on the ground that it is repugnant to the Constitution, or where any privilege or immunity is specially set up or claimed under the Constitution. In this Point II, Petitioner would have this Court review purely local law on the subject of domestic relations as determined by the courts of Indiana.

Respondent finds Petitioner's assertions unwarranted that Petitioner was penalized by Judge Bitzegaio, because she had resorted to the Illinois courts for relief. Even if true, which it is not, that question cannot now be raised in this Court, because Petitioner does not assert that these rulings invaded a constitutionally protected right. The scope of review by the Court of Appeals of Indiana is entirely different than the power of this Court to grant certiorari. Petitioner cites no case which holds that this Court has the right to review the record below to determine whether or not the evidence supported the custody order made in the decree of divorce, nor that supports Petitioner's contention that this Court can, on a petition for writ of certiorari, review the substantive law of the State of Indiana. The Court of Appeals for the Sixth Circuit in *Carqueville* v. *Woodruff*, 153 F.2d 1011 (1946), held:

> "The appellants, having failed to exhaust the state remedies available to them by not seeking a review of the rulings of the Ohio State Courts by its court of last resort, have no standing in their proceeding in the Federal District Court. Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406; Stonefield v. Buchanan, 6 Cir., 124 F.2d 23; Rowan v. People, 6 Cir., 147 F.2d 138; McCrae v. Jackson, 6 Cir., 148 F.2d 193.
>
> * * * * *
>
> Nevertheless, considering the question on its merits, as was done by the District Judge, it is clear that the District Judge was correct in his ruling. In the absence of a federal question the whole subject of domestic relations of husband and wife and parent and child belongs to the jurisdiction of the State Courts. In re Burrus, 136 U.S. 586, 10 S.Ct. 850, 34 L.Ed. 500; Clifford v. Williams, C.C. Wash., 131 F. 100; Ex parte Bell, D.C., 240 F. 758; Popovici v. Popovici, D.C., 30 F.2d 185. The present application presents no federal question."

The underlying theme asserted by Petitioner is that she was badly advised when told not to appear in the original divorce proceedings and that by reason thereof she has never had a full and fair hearing on the custody issue. Petitioner's counsel were

confronted with a hopeless situation because of Petitioner's immoral conduct and inadequacies as a mother (R. 132-158). Accordingly, Petitioner's counsel went forum shopping and initiated suit in Lake County, Illinois for separate maintenance before the entry of the decree of divorce, hoping to resolve the custody issue in the Illinois forum, rather than in the forum of the marital domicile where Respondent would have easy access by subpoena to the witnesses who would prove her unfitness to custody.

Petitioner, at pages 55 and 56 of the Record of the hearing on the petition to modify admitted she was aware of the trial date and admitted that she voluntarily refused to participate in the trial of the divorce case, knowing what the issues were and the misconduct with which she was being charged. Despite Petitioner's emotional appeal to this Court, Respondent respectfully submits that this Court has neither the constitutional nor statutory authority to review the rulings and decisions of the Indiana courts.

CONCLUSION

Article 3, Sec. 2 of the Constitution of the United States says in part that:

> "The judicial power shall extend to all Cases in law and Equity, arising under this Constitution, the laws of the United States * * *."

In pursuance of the powers invested to the Congress, it enacted Title 28, Sec. 1257, further defining the jurisdiction of this Court. Under Sec. (3), this Court may only review by writ of certiorari cases in which the validity of a state statute is drawn on the ground of its being repugnant to the Constitution. This Court, under its Rule 23(d), in prescribing the contents of the petition for certiorari, requires that the Constitutional provisions and statutes shall be set out verbatim, citing the volume and page where they may be found.

All of the foregoing demonstrates the requirement of a Constitutional question as a condition precedent for invoking

the jurisdiction of this Court. Petitioner has not complied with Rule 23(d) of this Court. Non-compliance with this section is grounds for dismissal. In any event, the omission to cite the Constitutional provisions relied upon constitutes a tacit admission that no Constitutional question is involved. Too, the petition does not comply with Rule 23(f), which was, obviously, designed to require a petitioner to identify specifically in the record matters "* * * as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari."

The constitutionality of the Indiana Long Arm Rules, which have the force and effect of statutes, was adjudicated in an action between the same parties and in which the same issue was presented, and which was decided adversely to Petitioner, in *People. Ex. Rel. Loeser* v. *Loeser, supra,* both by the Illinois Supreme Court and by this Court. This Court delineates the jurisdiction of the state courts and the federal courts in *Victory Carriers, Inc.* v. *Law,* 404 U.S. 202, 92 S.Ct. 418 (1971). This Court there said:

> " 'The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution * * *. Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which (a federal) statute has defined.' "

The petition should be denied.

Respectfully submitted,

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Of Counsel

APPENDIX A

IN THE COURT OF APPEALS OF INDIANA
First District

Jill S. Loeser, *Defendant-Appellant,* *vs.* Julius Loeser, *Plaintiff-Appellee.*	No. 1-1173-A-191 The Honorable Harold J. Bitzegaio, Judge.

APPEAL FOR THE VIGO SUPERIOR COURT

LOWDERMILK, *J.*

Defendant-appellant, Jill S. Loeser, and plaintiff-appellee, Julius Loeser, will be hereinafter referred to as "Jill" and "Julius" and the minor child of the parties as "Jeffrey."

Jill and Julius were married August 28, 1965, and Jeffrey was born to this union on January 22, 1968. The marriage was not one of bliss and happiness and Jill and Julius had marital difficulties which resulted in Julius taking Jeffrey to Highland Park, Illinois, to Jill's parents on March 26, 1971. Jill has since that time resided with her parents at their Illinois residence and she kept custody of Jeffrey until ordered by an Illinois court to give Jeffrey to Julius, about the 22nd day of May, 1972.

On April 19, 1971, Julis filed suit for divorce in the Superior Court of Vigo County, and proof of service of summons and process on Jill was made by the clerk's return of service of summons by mail, together with return receipts. On June 4, 1971, Jill filed suit for separate maintenance and custody of Jeffrey in the Circuit Court of Lake County, Illinois. On June

10, 1971, Julius obtained a restraining order without notice from the Vigo Superior Court which prohibited Jill from further prosecution of her action in Illinois. A temporary injunction was issued on June 14, 1971.

Then, on June 21, 1971, the Vigo Court granted Julius a divorce after a hearing at which Jill defaulted. Jill did not appear in the divorce action, as she said, because of the way she had been treated in Terre Haute and because her attorneys advised her that the courts of Illinois had jurisdiction of the action. She knew she was charged with the misconduct of adultery and did not want to face it at that time.

A Terre Haute attorney had been employed by attorney Arthur Morse of Chicago to consult with him in regard to the course of action Mr. Morse should take in respect to Jill. Neither said Terre Haute attorney nor Mr. Morse appeared of record on Jill's behalf; however, the Terre Haute attorney was in the court room as an observer and was called as a witness by Julius at the trial. He testified that attorney Morse had told him that he would not appear in the cause and no one should appear in Jill's behalf.

On June 28, 1971, Julius filed a petition for writ of habeas corpus in the Circuit Court of Lake County, Illinois, and on July 8th of that year in that cause the Lake Circuit Court dismissed Jill's separate maintenance suit and entered an order requiring Jill to deliver Jeffrey to Julius. That case was decided on the question of jurisdiction.

Jill took that case to the Illinois Supreme Court on the day the judgment was made against her and on July 14, 1971, the Illinois Supreme Court issued an order staying the writ of habeas corpus and ordered Jeffrey to be placed in the custody of Jill's parents, Leonard and Gladys Scheyer, and granted Julius visitation, one week each month in Chicago.

The Illinois Supreme Court, on May 22, 1972, affirmed the decision of the Lake Circuit Court and later set aside its stay

order and Jill delivered Jeffrey to Julius. She was allowed to have Jeffrey visit for one week each month in Illinois.

Jill filed a petition for writ of certiorari in the United States Supreme Court and the same was denied on November 13, 1972. Thereafter, Jill was allowed by Julius to visit Jeffrey every other week end at Julius' residence in Terre Haute.

During this litigation and from March 26, 1971, until June of 1972, Jill had the physical custody of Jeffrey: after June, 1972, Julius had the physical custody and charge of Jeffrey.

Jill's appearance was entered by her Terre Haute attorney in Vigo County on December 11, 1972, and on December 22nd of that year she filed her petition to modify the decree, which was heard on April 18, 1973.

Appellant Jill's brief contains much of the evidence covering the facts of the divorce case. However, we shall consider that evidence as surplusage in the appeal before us inasmuch as Jill's motion to modify the decree as to custody is all that is before this court.

Jill's motion to correct errors was timely filed, consists of six specifications, together with a memorandum of reasons and is directed to the petition to modify the custody under the decree.

On August 3, 1972, the trial court overruled the motion to correct errors and Jill did, on August 20, 1973, file her praecipe for a full and complete transcript of the entire record of the cause, beginning with plaintiff's complaint for absolute divorce.

Jill has consolidated for argument specifications of her motion to correct errors 1, 2, 3, and 6, and we shall treat them as one under Ind. Rules of Procedure, Appellate Rule 8.3(A)(7), which specifications raise the following issue; did the trial court commit error by refusing to hear evidence at the hearing on the petition to modify relating to matters which occurred prior to the granting of the divorce decree? Jill argues that the trial

court did not have before it sufficient evidence at the trial of the divorce to properly make a determination as to the custody of Jeffrey. Jill contends that since the divorce was *ex parte*, she has had no opportunity to present evidence relating to matters prior to the granting of the divorce decree.

However, it is our opinion that Jill cannot be now heard to complain that she had no opportunity to present evidence at the trial of the divorce case. The record discloses that Jill was properly served and had notice of the trial and, in fact, had her Indiana attorney present at the trial as an observer. The Indiana attorney had specific instructions not to enter an appearance on Jill's behalf. Jill had the opportunity and right to be heard and present evidence at the trial and it was by her choice that she did not exercise such rights and cannot now be heard to complain.

In the case of *Dufour* v. *Dufour* (1971), ... Ind. ....., 273 N.E. 2d 102, 104, 105, our Supreme Court held:

> ". . . It is a well settled rule of law that the modification hearing cannot be used to retry the issues settled by the divorce decree. . . .
>
> * * * * *
>
> Accordingly, testimony regarding the appellant's conduct prior to the original divorce decree was inadmissible in the modification hearing, and does not, therefore, support the trial court's decision."

This is further borne out by the case of *Huston* v. *Huston* (1971), ... Ind. ..... 267 N.E. 2d 170, wherein it was held that a change of custody must result from changes in conditions since the last court order which necessitates a change of custody, for the welfare of the children.

Thus, it is clear that the trial court properly excluded evidence of conduct of the parties prior to the last court order (the divorce decree.)

Appellant Jill's specifications of error 4 and 5 have been consolidated by her in her brief and argued together. These

specifications, briefly, are that the court erred in not permitting Jill to present evidence to show a change of conditions as to Jeffrey's welfare while in her custody and the custody of her parents while in Lake County, Illinois, from and after the rendition of the divorce in Vigo County, Indiana, in June of 1971, to June of 1972, at which time custody of Jeffrey was returned to Julius at Terre Haute.

Jill contends she was punished for pursuing her Illinois action by exclusion of her evidence during the year Jeffrey was out of the jursidiction of the court and after she had purged herself of any contempt of the Indiana court by delivering her son to Julius.

Julius first contends on this issue that Jill failed to make a proper offer to prove at trial. An examination of the record discloses that when Jill did attempt to introduce evidence relating to the one year period in question, the trial court sustained an objection to any such evidence and informed the parties that no such evidence would be heard. Counsel for Jill made it clear to the court what the evidence was intended to prove, although he did not make it in the words of an offer to prove in the usual and accepted form of offer to prove as established by usage and custom in Indiana.

Without deciding whether the offer to prove was sufficient to save the question in the trial court, and assuming arguendo that the offer to prove was sufficient, we must first decide whether this issue has been properly saved for appeal.

Julius also urges that Jill has failed to comply with Ind. Rules of Procedure, Trial Rule 59, Motion to Correct Errors, (B), which reads as follows to-wit:

> "(B) Form of motion. A motion to correct error shall state the issues upon which error is claimed, but the issues are not required to be stated under or in the language of the reasons allowed by these rules, by statute or by other law. The statement of claimed errors shall be specific rather than general, and shall be accompanied by a state-

ment of the facts and grounds upon which the errors are based."

We are now confronted with the problem of whether Jill did or did not save her record on this issue in her motion to correct errors. A careful review of the motion to correct errors, together with the memorandum made a part thereof, discloses a complete failure to set out the question, the objection, the statement of counsel as to what the evidence would be if the witness was permitted to answer, and the court's ruling thereon.

The case of *Daben Realty Co., Inc.* v. *Stewart* (1972), Ind. App. ....., 290 N.E. 2d 809, 812, in speaking on this proposition, states:

> "Nowhere in the motion nor in appellant's brief is the question or the plaintiff's objection set out, either in substance or verbatim.
>
> Trial Rule 59(B), IC 1971, 34-5-1-1, requires that '[t]he statement of claimed errors [in the motion to correct errors] shall be specific rather than general. . . .' This rule, we believe, preserves the pre-existing case law requirement that:
>
> > ' "In order to preserve for review the refusal of the court to permit a witness to answer a question on direct examination, *the motion for new trial must show the question, the objection, and the offer to prove what evidence would have been given by the witness in answer to the question.*" . . .'
>
> Appellant's failure to comply with the rule results in nothing being presented to us for review. . . ." (Our emphasis.)

See, also, *State* v. *Haldik* (1973), ... Ind. App. ....., 302 N.E. 2d 544.

In the case of *Bennett* v. *State* (1973), ... Ind. App. ....., 304 N.E. 2d 827, this court, in passing on the requirement of saving a question for appeal by properly setting it out in the motion to correct errors, said:

> "While the motion to correct errors serves as the complaint on appeal, its primary purpose is to afford the trial court the opportunity to rectify errors it has committed. *Bud Gates, Inc.* v. *Jackson* (1970), 147 Ind. App. 123, 258 N.E. 2d 691.
>
> Without being informed by a specific statement of the facts and grounds on which the claimed error is based, the trial judge cannot rectify his errors, if any. Were it otherwise, an appellant could propel himself into this or the Supreme Court by general statements of claimed errors, detailed at leisure after his motion to correct errors is overruled. . . ."

This question is jurisdictional and although the question, objection, court's ruling, and an informal offer to prove have been set out in the brief the same is inadequate to preserve the question on appeal as a waiver had already taken place by the failure to follow the requirements of Tr. 59(B) in the motion to correct errors.

The third issue is a compilation of specifications of error numbered 1, 2, 3, 4, 5, and 6, and is whether the trial court in its ruling abused its discretion and the ruling was contrary to law in that it failed to change custody of the minor child to Jill.

Our Supreme Court held, in the case of *Gilchrist* v. *Gilchrist* (1947), 225 Ind. 367, 372, 75 N.E. 2d 417, as follows:

> ". . . The rights of parents, however, are not absolute. They must yield to the welfare of the child. Its welfare and best interest are the paramount and controlling considerations in all disputes over the custody of the child. [Cases cited omitted.] The disposition of children is not controlled by hard and fast rules of law but by the exercise of the sound judicial discretion of the court confronted with the problem. Review by an appellate court of such disposition is limited to the question of abuse of judicial discretion. [Cases cited omitted.]"

The evidence as to Jeffrey's conduct, behavior and well being and as to his best interests is conflicting. It is elementary that this

court does not weigh the evidence. There is adequate evidence upon which the trial court could find as it did.

The case of *Brickley* v. *Brickley* (1965), 247 Ind. 201, 204, 210 N.E. 2d 850, relates as follows:

> "While we are not able to say the trial judge could not have found otherwise than he did upon the evidence introduced below, this Court, as a court of review has heretofore held by a long line of decisions that we are in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, did not properly understand the significance of the evidence, or that he should have found its preponderance or the inferences therefrom to be different from what he did.
>
> On appeal it is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by appellant before there is a basis for reversal. . . ."

JUDGMENT AFFIRMED.

ROBERTSON, *P. J.* and LYBROOK, *J.* Concur.

APPENDIX B

STATE OF INDIANA
SUPERIOR COURT OF VIGO COUNTY

JULIUS LOESER,
Plaintiff,

vs.

JILL C. LOESER,
Defendant.

Cause No. S—71-250

ORDER

The Court, having heretofore head the evidence in this cause relative to Defendant's petition to modify the decree entered by this Court on June 21, 1971, and now being sufficiently advised, denies said petition insofar as custody of the minor child of the parties is concerned. It is hereby Ordered that said decree be modified as to visitation rights as follows:

1. Defendant shall have the right to have the minor child of the parties, namely Jeffrey Loeser, now age five years, visit with her one weekend per month, from Friday evening until Sunday afternoon at 4:00 P.M. following.

2. Defendant shall have the right to have the child visit with her for thirty (30) consecutive days during the summer vacation, such visitation to be arranged at least one month prior to the visitation period. During the time said child is with Defendant, Plaintiff shall pay directly to Defendant the sum of One Hundred Dollars ($100.00) per week for the support of said child.

3. Defendant shall have the right to have the child visit with her for one-half (½) of the Christmas vacation each year,

said visitation to be arranged and agreed upon thirty (30) days prior to the beginning of the vacation period.

4. Defendant is directed to limit telephone calls to said child to not more than one (1) cali per week.

5. This order effective upon Defendant posting with the Court a performance bond in the amount of Ten Thousand Dollars ($10,000.00) guaranteeing strict compliance with this Order, surety on said bond subject to the approval of the Court. Said bond shall be effective for a term of one (1) year and subject to renewal from year to year or to cancellation upon satisfactory compliance with the terms of this Order.

6. Otherwise, the decree heretofore entered shall remain in full force and effect.

So Ordered this 3rd day of May, 1973.

/s/ HAROLD J. BITZEGAIO
Judge, Superior Court of
Vigo County

APPENDIX C

GOLDENHERSH, *Justice*.

Respondents, Jill Loeser, Leonard R. Scheyer and Gladys Scheyer, appeal from the judgment of the circuit court of Lake County awarding a writ of *habeas corpus* which directed that Jeffrey, the three-year-old son of Jill Loeser and petitioner, Julius Loeser, be placed in the custody of the petitioner.

The record shows that petitioner, Julius Loeser, and the respondent Jill Loeser were married in Chicago in 1965 and throughout the period of their marriage resided in Terre Haute, Indiana. The respondents Leonard R. Scheyer and Gladys Scheyer, residents of Lake County, are the parents of respondent Jill Loeser. Jeffrey was born in January 1968.

The Loesers' marriage was beset with difficulties and in the early part of 1971 appeared to be in danger of termination. Because of the tensions in their home they agreed that it would be advisable that Jeffrey visit with his maternal grandparents while they sought a solution to their problems and on March 26, 1971, petitioner brought Jeffrey to the home of the respondents Scheyer, in Highland Park. Petitioner alleges that it was agreed between the parties that Jeffrey would be returned to Terre Haute in three weeks but the respondents dispute the allegation. On March 30, 1971, apparently without notice to petitioner, respondent Jill Loeser departed Terre Haute and moved to her parents' home in Highland Park. It is not clear from the record whether she intended the removal to Illinois to be temporary or permanent.

On April 19, 1971, petitioner filed suit for divorce in Vigo County, Indiana. Service of process was effected by means of the Indiana "long arm" statute. On June 21, 1971, the divorce action was heard and a decree rendered and entered which *inter alia*

found that petitioner was a fit person to have custody of Jeffrey and awarded him custody of the child. The decree shows that the respondents did not appear in the divorce action, and it was heard as a default matter.

The petition for *habeas corpus* was filed in the circuit court of Lake County on June 28, 1971, and the judgment from which the respondents appeal was entered on July 8, 1971.

Respondents contend that "irrespective of the Indiana decree awarding custody to the father, the Illinois circuit court had both the responsibility and the power to conduct an evidentiary hearing to determine the best interests and welfare of the child, and it was error not to have done so." They argue that since the Indiana court heard no testimony relevant to petitioner's fitness to have custody of the child, the court should have considered the issue *de novo* for the purpose of determining whether there were circumstances not known to the Indiana court or changes in circumstances which would affect the best interests of the child. Further, they argue that because Jeffrey, at the time when the Indiana decree was entered, was not in Indiana but was in fact in the custody of his maternal grandparents, the respondents Scheyer, who were not parties to the Indiana proceeding and not subject to the jurisdiction of the Indiana court, an evidentiary hearing was required. They also contend that the trial court denied respondents' repeated requests for reasonable time in which to file responsive pleadings so "that issues could be framed prior to a meaningful hearing on the petition for *habeas corpus*."

In People ex rel. Bukovich v. Bukovich, 39 Ill.2d 76, at page 79, 233 N.E.2d 382, at page 384, we said: "The courts of Illinois have both the responsibility and the power to inquire into the right to custody and concomitant best interests of a child within the jurisdiction where the passage of time since a prior custody determination of a sister State makes it possible that the circumstances pertaining to the fitness of the parties seeking to be awarded custody of the minor may have substantially changed." The decision as to whether the power should be

exercised here is dependent upon considerations hereinafter discussed.

[1] The record shows that respondent Jill Loeser had ample opportunity to defend the action in Indiana. In colloquy in the trial court and in respondents' brief it is admitted that she received a summons and a copy of the complaint. The record shows that notice of the hearing date of the Indiana divorce proceeding was served on Illinois counsel representing respondent Jill Loeser and that an Indiana attorney appeared at the hearing and upon interrogation advised the court that he had been retained by her Illinois counsel "to consult with him," that he had been advised by her Illinois counsel that no one would appear for her and that he was there as an "observer."

[2] Under Indiana law the provision of the decree awarding custody of Jeffrey to the petitioner was *res judicata* and in order to justify a change of custody there must have been a change in conditions of such character as to make the change of custody necessary for the welfare and happiness of the child. (Brickley v. Brickley (1965), 247 Ind. 201, 210 N.E.2d 850, 211 N.E.2d 183.) It is true that the Indiana court did not hear testimony specifically directed toward the question of petitioner's fitness to have custody of the child. We note, however, that although his fitness to have custody was not made an issue in the case, there is nevertheless, sufficient testimony to support the court's finding.

With respect to respondents' contention that they should have been given time to file responsive pleadings, the record fails to reflect what issues would have been "framed" for determination in a "meaningful hearing," and upon the record before us we hold that the circuit court did not err in awarding the writ without an evidentiary hearing.

Respondents contend next that the Indiana decree is invalid for the reason that the statute and rules under which service of process was effected are in derogation of Illinois law and offend

due process in that they do not require "restricted mail delivery." Rule 4.1 of the Indiana Rules of Trial Procedure IC 1971, 34-5-1-1, provides for service of process by "sending a copy of the summons and complaint by registered or certified mail or other public means by which a written acknowledgment of receipt may be requested and obtained to his residence, place of business or employment with return receipt requested and returned showing receipt of the letter." Rule 4.4 provides:

(A) *Acts serving as a basis for jurisdiction.* Any person * * * that is a non-resident of this state, a resident of this state who has left the state, * * * submits to the jurisdiction of the courts of this state as to any action arising from the following acts * * *:

* * * * *

(7) living in the marital relationship within the state notwithstanding subsequent departure from the state, as to all obligations for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in the state. * * *

(B) *Manner of service.* A person subject to the jurisdiction of the courts of this state under this rule may be served with summons:

(1) As provided by Rules 4.1, * * * ." Trial Rule 4.11 provides:

"Whenever service by registered or certified mail or other public means by which a return receipts may be requested is authorized, the clerk of the court * * * shall send the summons and complaint to the person being served at the address supplied upon the summons, or furnished by the person seeking service. In his return the clerk of the court * * * shall show the date and place of mailing, a copy of the return receipt if and when received by him showing whether the mailing was accepted or returned, and, if accepted, by whom. The return along with the receipt shall be promptly filed by the clerk with the

pleadings and become part of the record. If a mailing by the clerk of the court is returned without acceptance, the clerk shall reissue the summons and complaint for service as requested, by the person seeking service."

[3, 4] The requisites of due process are satisfied if the manner of effecting service of summons gives reasonable assurance Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 233; Internawhom the action is brought is given reasonable time to appear and defend on the merits. (McGee v. International Life Insurance Co., 355 U.S. 220, 78 S.Ct. 199, L.Ed.2d 223; International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95.) Service as effected under the Indiana statute and rules meets this test, and due process does not require precise compliance with the allegedly more stringent requirements of the Illinois statute and the rules of this court.

We find no basis for reversal and the judgment of the circuit court of Lake County is affirmed.

Judgment affirmed.

APPENDIX D

IN THE SUPERIOR COURT OF VIGO COUNTY

STATE OF INDIANA, } ss:
COUNTY OF VIGO. }

JULIUS LOESER, *Plaintiff,*

vs.

JILL S. LOESER, *Defendant.*

Cause No. S-71-250

MOTION TO CORRECT ERRORS

Comes now the defendant, Jill S. Loeser, by her attorney of record and respectfully moves the Court to correct errors in the within cause and in support of her Motion to Correct Errors alleges the following grounds:

1. The judgment of the Court is contrary to law.

2. The judgment of the Court is not sustained by sufficient evidence.

3. Error of law occurred in that the Court did not grant defendant a trial de novo on her petition to modify the custody decree herein.

4. Error of law occurred in that the Court sustained plaintiff's objections and thereby precluded the admission of defendant's evidence concerning relevant and material facts, circumstances and events occurring from the date of the divorce decree rendered herein in June, 1971, to and including the date physical custody of the parties minor child was delivered to the plaintiff in June, 1972, and which said facts, circum-

stances and events bore upon material changes in circumstances affecting the welfare and best interests of the minor child of the parties.

5. Error of law occurred in that the Court restricted defendant's evidence to events transpiring after the date physical custody of the minor child of the parties was delivered to the plaintiff in June, 1972, and denied the admission of defendant's evidence concerning relevant and material facts, circumstances and events which transpired prior to June, 1972, and bore directly upon material changes in circumstances directly affecting the welfare and best interests of the minor child of the parties.

6. Error of law occurred in that the Court abused its discretion in failing to grant defendant's motion to modify the decree herein and award defendant custody of the minor child of the parties.

WHEREFORE, the defendant, Jill S. Loeser, by her attorney of record respectfully prays the Court to sustain this Motion to Correct Errors and that the judgment herein be modified to award custody of the minor child of the parties to the defendant or, in the alternative, grant a new trial herein and for all other proper and appropriate relief in the premises.

/s/ FREDERICK T. BAUER
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Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that on the 2 day of July, 1973, service of a copy of the above and foregoing Motion to Correct Errors was made upon David E. Rosenfeld, Attorney for Plaintiff, 410 Star Building, Terre Haute, Indiana, by depositing a copy in the United States Mail.

/s/ FREDERICK T. BAUER
Frederick T. Bauer

APPENDIX E

IN THE SUPERIOR COURT OF VIGO COUNTY
1971 Term

STATE OF INDIANA, } ss:
COUNTY OF VIGO. }

JULIUS LOESER,
Plaintiff,
vs.
JILL S. LOESER,
Defendant.
} Cause No. S-71-250

DECREE

Comes now the plaintiff in person and by counsel and it appearing to the court that:

(a) Defendant, Jill S. Loeser, was, at the time of filing the complaint in this action on the 19th day of April, 1971, a bona fide resident of Terre Haute, in Vigo County, Indiana;

(b) That Jill S. Loeser, a resident of the State of Indiana, left the state prior to the filing of this action;

(c) That this is an action for divorce;

(d) That plaintiff herein, Julius Loeser, was, at the time of filing this complaint and now is a continuous and bona fide resident of Terre Haute, Vigo County, in the State of Indiana, for thirty years;

(e) That plaintiff and defendant herein were living in the marital relationship in the State of Indiana at the time of the filing of this complaint, and that plaintiff, at all times herein relevant, continued to reside in the State of Indiana;

(f) Service of summons and complaint upon the defendant herein was made upon her by sending a copy of the summons and complaint by certified United States mail, return receipt requested;

(g) That a copy of said summons and complaint was duly served upon the defendant by the clerk of the Superior Court of Vigo County on the 19th day of April, 1971, and the clerk's certificate of mailing certifies to said service;

(h) That said summons and complaint were duly served upon the defendant by certified mail, return receipt requested; that said receipt was duly received by the clerk of the Superior Court of Vigo County and the clerk duly certified to the return of service of said summons and complaint;

(i) That this court has jurisdiction of the parties plaintiff and defendant and of the subject matter;

(j) The court further finds that plaintiff and defendant are the owners, as tenants by the entireties, of the following described real estate in Terre Haute, Vigo County, Indiana, to-wit:

> Lot No. Seven (7) in Heritage Subdivision, being a subdivision of a part of the Northwest Quarter (NW¼) of Section Twenty-five (25), Township Twelve (12) north, Range Nine (9) west, as per recorded plat thereof recorded in Plat Record 18, page 32 of the records of the Recorder's office of Vigo County, Indiana, in the City of Terre Haute, Vigo County, Indiana;

and

(k) The court further finds that the parties, either jointly or individually, were the owners of certain personal property, namely, furniture, household goods, appliances, cooking utensils and all other personal property in the home.

And it further appearing to the court that this cause has been duly filed for more than sixty days, the defendant, Jill S. Loeser, having failed to appear, and the prosecutor of Vigo

County, Indiana, Ralph Berry, now appearing, the defendant is now three times audibly called in open court and appearing not, is defaulted; that this cause is at issue upon the answer filed by Ralph Berry, prosecutor of Vigo County, Indiana, the same is now submitted to the court for trial and findings without the intervention of a jury.

And the court having heard the evidence and being duly advised in the premises, now finds:

(a) That plaintiff and defendant were continuous and bona fide residents of Terre Haute, in Vigo County, Indiana, for more than six months last past and of the State of Indiana for more than one year immediately preceding the filing of the above entitled cause of action, being the 19th day of April, 1971;

(b) That the allegations of plaintiff's complaint are true; and

(c) That prior to the filing of the complaint herein, defendant was guilty of cruel and inhuman treatment toward the plaintiff, and that defendant was guilty of adultery prior to the filing of the complaint herein, and that plaintiff did not condone said misconduct on the part of the defendant.

The court now further finds that plaintiff is entitled to a decree of divorce from the defendant on the grounds set forth above.

The court further finds that plaintiff is a suitable and proper person to have the care, custody, control and education of Jeffrey Michael Loeser, born January 22, 1968, child of plaintiff and defendant, and the court further finds that defendant is not a fit and proper person to have the care, custody, control and education of Jeffrey Michael Loeser.

It Is, Therefore, Considered, Ordered, Adjudged and Decreed by the court that the bonds of matrimony heretofore existing between plaintiff and defendant herein be, and they hereby are, dissolved, and that plaintiff is hereby granted an absolute divorce from defendant;

It Is Further Considered, Ordered, Adjudged and Decreed by the court that plaintiff have the care, custody, control and education of Jeffrey Michael Loeser, child of plaintiff and defendant, born January 22, 1968, and that defendant have reasonable rights of visitation of their said son;

It Is Further Considered, Ordered, Adjudged and Decreed by the court that plaintiff be, and he hereby is, declared to be the sole and absolute owner, subject to all liens and encumbrances, of the following described real estate in Vigo County, Indiana, to-wit:

> Lot No. Seven (7) in Heritage Subdivision, being a subdivision of a part of the Northwest Quarter (NW¼) of Section Twenty-five (25), Township Twelve (12) north, Range Nine (9) west, as per recorded plat thereof recorded in Plat Record 18, page 32 of the records of the Recorder's office of Vigo County, Indiana, in the City of Terre Haute, Vigo County, Indiana,

and defendant is ordered and directed to execute a quit-claim deed to the above described real estate to plaintiff, and failing to do so within ten days from entry hereof, the court appoints David E. Rosenfeld commissioner, with full power and authority in the premises to convey said real estate, on behalf of plaintiff, in accordance with the provisions hereof;

It Is Further Considered, Ordered, Adjudged and Decreed by the court that plaintiff be, and he hereby is, declared the sole and absolute owner of all furniture, household goods and all other personal property located in the real estate described above.

Judgment accordingly.

/s/ HAROLD J. BITZEGAIO
Judge, Superior Court of Vigo County

STATE OF INDIANA, }
COUNTY OF VIGO. } SS:

I, William J. Brighton, Clerk of the Vigo Circuit Court and Ex officio Clerk of the Superior Court of Vigo County, do hereby certify that the above and foregoing is a true and complete copy of the order entered by said Court on this 21st day of June, 1971.

/s/ WILLIAM J. BRIGHTON
Clerk, Superior Court of Vigo County

APPENDIX F

IN THE SUPERIOR COURT OF VIGO COUNTY
1971 Term

STATE OF INDIANA, } SS.
COUNTY OF VIGO. }

JULIUS LOESER,
Plaintiff,

vs.

JILL S. LOESER,
Defendant.

Cause No. S-71-250

PETITION TO MODIFY DECREE

Comes now the defendant in the above entitled cause of action and alleges and says:

1. That on the 21st day of June, 1971, the Court entered a decree and judgment in this cause whereby the Court awarded plaintiff the care and custody of the minor child of the parties, to-wit: Jeffrey Michael Loeser and granted defendant the right to visit said child at reasonable times and places.

2. That since the decree above mentioned was made and entered, conditions surrounding the child and the parties to the divorce have materially changed; and such change of conditions and circumstances render it necessary and advisable that the provisions for the custody and control of the child made in that decree be reviewed by this Court and that that part of the decree pertaining to the custody and control of the child be set aside and that the Court modify the decree by granting to petitioner the

custody and control of said child and further that the plaintiff herein be ordered to pay a reasonable amount into the office of the Clerk of this Court for the support of said minor child.

3. That the decree above mentioned was made and entered in an ex parte proceeding at which your petitioner did not appear and no evidence was offered in behalf of the petitioner relative to her suitability and fitness to have the care and custody of said minor child thereby preventing the Court from fully entertaining the issue of the welfare and best interests of said child.

4. That since the above mentioned decree was entered by this Court, litigation concerning the custody of said minor child has progressed from the Circuit Court of Lake County, Illinois, to the Supreme Court of the State of Illinois to the United States Supreme Court where a petition for a Writ of Certiorari was recently denied. This litigation was commenced at or about the time the decree of this Court was made and entered and such litigation was terminated in November, 1972. Throughout most of the course of said litigation, since the date of the decree of this Court, and until on or about July 21, 1972, said child was under the immediate care, supervision, and control of the petitioner.

5. On or about July 21, 1972, plaintiff gained the physical custody of said minor child. Since said date, plaintiff has proved himself incapable of properly controlling and managing said child and said change of custody to plaintiff so disrupted the routine and proper management of said child as to render it a distinct detriment to him and to his welfare.

6. Petitioner resides with her parents in Highland Park, Illinois, and has made that city her residence prior to and ever since the date of the decree in this cause. Her efforts to work out and arrive at a suitable and reasonable visitation schedule with said child have been frustrated by the plaintiff and as a result the petitioner has not been able to visit said child or have said child visit her since November 20, 1972.

7. That pending a hearing on this petition to modify the decree with respect to custody of said minor child, a hearing should be had to establish a visitation schedule satisfactory to both parties and in the best interests of said minor child.

WHEREFORE, petitioner prays that plaintiff be ordered to appear and answer this petition, and that prior to a final hearing on petitioner's petition to modify the decree as to custody a preliminary hearing be had, and plaintiff be ordered to appear thereat and that, at such time, the decree be modified to establish a definite visitation schedule and that on final hearing the decree be further modified by changing the custody and control of the minor child and granting the same to petitioner and that plaintiff be ordered to pay into the office of the Clerk of this Court a reasonable sum for the support of said minor child.

/s/ JILL S. LOESER by
Jill S. Loeser
/s/ FREDERICK T. BAUER
Attorney

Subscribed and sworn to before me a notary public in and for said county and state this 22nd day of December, 1972.

My Commission Expires March 10, 1976.

/s/ MARY E. PAIGE
Mary E. Paige
Notary Public

CERTIFICATE OF SERVICE

I certify that on the 22nd day of December, 1972, service of a copy of the above and foregoing Petition to Modify Decree was made by mail upon David Rosenfeld, Attorney-at-Law, 410 Star Building, Terre Haute, Indiana.

BAUER, BAUER AND BAUER
By /s/ FREDERICK T. BAUER
Frederick T. Bauer
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-686

JILL S. LOESER,

Petitioner,

vs.

JULIUS LOESER,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1974

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Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The extraordinary length of the Respondent's Brief in Opposition to the Petition for Certiorari is obviously an attempt to obfuscate the sharply defined issues raised by the Petition herein. Since many of the statements contained therein are not germane to these points, no attempt will be made to reply to them seriatim.

The Brief in Opposition filed by Respondent herein, rather than demonstrating that the Petition for Writ of Certiorari should not be granted, shows why the Petition ought to be granted. The attitude of Respondent, which was adopted by the Courts of Indiana, is based upon several faulty premises. It is to review these premises, which do rise to constitutional dimensions, that Petitioner files the Petition herein.

The first premise is that the Indiana Courts had jurisdiction over the original divorce proceeding herein. Respondent argues that Petitioner failed to appear in the original divorce proceeding for the purpose of frustrating the jurisdiction of the Indiana courts. But, as demonstrated in the Petition herein, that Court had no jurisdiction over either Petitioner or the minor child of the parties, insofar as custody of the child was concerned. Petitioner was not a resident of Indiana at the time the original divorce suit was instituted. She was not personally served with summons either in Indiana or Illinois. There is nothing in the record in this cause which shows that any summons was served upon her in any manner. The assertion is made that the summons was served by mail at her domicile, but there is nothing in this record, other than the bald assertions by counsel that the service of the summons was at the address at which she resided at the time. The fact that she had obtained actual knowledge of the proceedings in some manner, and had an observer in Court at the time of the original hearing cannot confer jurisdiction upon a court which it did not have. This lack of jurisdiction was not waived by having an observer present.

Of even more importance, the Indiana courts did not have jurisdiction over the minor child of the parties. Respondent completely ignores the most important fact in

this situation: He had deprived the Court of jurisdiction over the minor child of the parties by himself removing it from the jurisdiction of the Court and turning the child over to Illinois residents. It was his action, not that of Petitioner, which deprived the Indiana Courts of jurisdiction. Petitioner sought relief in the proper forum—the state of domicile or both herself and the child—Illinois. It was as a punishment for these actions that the Indiana courts later deprived her of the right to be heard on the issue of child custody. Respondent ignores these facts in claiming that there is no constitutional issue. The fact that this Court denied Petitioner's Petition for Writ of Certiorari from the judgment of the Illinois Supreme Court does not preclude it from now granting this Petition. The Illinois Supreme Court did not decide the issue which Petitioner presents to this Court now: whether the Indiana statutes regarding service of process meet those standards of due process which this Court has laid down. As demonstrated in the Petition for Writ of Certiorari, those statutes do not. Lack of jurisdiction may be raised at any time —even for the first time on appeal, or by way of collateral attack. *In Re Carmen's Petition*, 165 F. Supp. 942 (N.D. Cal. 1958); *Wymard* v. *McCloskey & Co.*, 342 F.2d 495 (3d Cir. 1965), cert. den. 382 U.S. 823; *Mahoney* v. *Northwestern Bell Tel. Co.*, 377 F.2d 549 (8th Cir. 1967).

Respondent contends that the refusal to allow Petitioner to introduce relevant and pertinent evidence in the post-decree hearing is not a constitutional issue. Is local law exempt from due process? Certainly not. One misconception must be corrected at the outset. In responding to this point, Respondent again distorts Petitioner's argument. Her central complaint is not that she was prohibited from introducing evidence of things which occurred prior to the

entry of the divorce, but that she was precluded from introducing evidence of events which occurred *after* the divorce was granted, and while she held custody of the child pursuant to the lawful order of the Illinois courts. There is no argument or authority to support such a ruling. None has been advanced by Respondent, or by the Indiana courts during these proceedings. It is this arbitrary and punitive ruling which deprived Petitioner of her rights to a full hearing on the issue which is central to the future of a young child—with which parent shall he live; by whom shall he be raised?

Petitioner is not asking this Court to resolve the custody issue, or even to review the decisions made by the Courts below on this issue. What she is asking is that she be given an opportunity to be heard and to introduce evidence on this issue which is clearly proper.

Contrary to Respondent's arguments, Petitioner does not ask this Court to review the substantive law of the State of Indiana as it pertains to divorce and child custody, or to review the decisions made upon the evidence which was presented. She does ask this Court to review obviously arbitrary and capricious and punitive actions visited upon her because she sought to present these same issues in a court which ultimately held that it did not have jurisdiction (although that holding was based upon orders of the Indiana Courts, which did not have jurisdiction on the child custody issue).

While Respondent attacks Petitioner as immoral and unfit to have custody of her child, no such evidence has ever been introduced in any court.

Respondent's argument that this Court has no jurisdiction to grant this Petition is frivolous and an affront to

this Court. Is it not a denial of due process to deny a person a full and fair hearing? Cannot a judge deprive a person of due process as surely as an unconstitutional statute? The answer is obvious.

The prime example of the vindictiveness of the trial judge here is his *sua sponte* limitation of Petitioner's right to communicate with her child by telephone, even though no such relief was requested, and was not at issue. Even though the only issue before him was Petitioner's request that she be given more rights to custody and visitation, he curtailed her visitation rights, with no evidence whatsoever to support such action. She was foreclosed from introducing evidence after the divorce, for a period of one year —twenty per cent of the child's life at that time. This is not a mere matter of local law. It is a deprivation of the right which separates a civilized society from a barbaric one—the right of a person to have a full and fair opportunity to present his side of the controversy and to have a decision based upon all competent and relevant information.

In addition, a child has such due process rights as well. A child should not be the pawn of an arbitrary judge. He, too, has the right to a full and fair determination of his future. Indeed, his rights are in fact paramount. A full determination of those rights based upon all competent evidence is required, and cannot be cut off by the whim of an arbitrary judge.

This Court has ruled in a number of cases that a full and fair hearing must be held before a person may be deprived of a constitutionally protected interest. *Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564, 92 S.Ct. 2701 (1972); *Fuentes* v. *Shevin,* 407 U.S. 67, 92 S.Ct. 1983 (1972); *Perry* v. *Sinderman,* 408 U.S. 593, 92 S.Ct. 2694

(1972); *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970). This is such a right. A full hearing on the deprivation of that right has been denied. It matters not at all whether that deprivation is the result of a state statute, an administrative regulation, or the whim of a judge. The right to due process has been infringed.

This Court should grant certiorari to review that infringement.

Respectfully submitted,

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